IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7707 OF 2006

Ratan Ramchandra Kulenge & Ors. ...Petitioners

Versus

The District Collector,
Pune, District Pune. ...Respondent

Shri S.S.Kulkarni for the Petitioners.
Ms Vaidehi Mhaispurkar, A.G.P for the Respondents.

CORAM : ABHAY S.OKA, J.
DATED : JUNE 28, 2007.

P.C.:

1. Heard submissions of the learned counsel appearing for the parties.

2. The Petitioners are the original Plaintiffs in a suit for declaration. The prayer made in the suit filed by the Petitioners is for declaration that the Defendants/Respondents do not have any right, title and interest in respect of the property described in paragraph No.1 of the plaint. The trial Court dismissed the suit by holding that the Petitioners have proved their right and title in respect of the suit property but they have failed to prove their possession over the suit property. An Appeal was preferred by the Petitioners in which an Application was made for amendment of the plaint. The Application for amendment

of the plaint is based on the allegation that during the pendency of the suit, the Respondents have illegally dispossessed the Petitioners. Therefore, by way of an amendment, a prayer was sought to be incorporated for a decree for possession. By the order impugned dated 17th June, 2006, the learned Additional District Judge, Baramati rejected the said Application.

3. The learned Advocate for the Petitioners has invited my attention to the pleadings as well as to the averments made in the Application for amendment. He pointed out that an Application for amendment of the plaint for incorporating the same prayers was made during the pendency of the suit which was rejected by the trial Court by order dated 06th February, 2003. He pointed out that the Application for the amendment was rejected only on the basis of the amendment made in Rule 17 of Order VI of the Code of Civil Procedure, 1908 with effect from 01st July, 2002 and the amendment is not rejected on merits. He pointed out that the suit filed by the Petitioners has failed only because the Petitioners have not established that they were in possession. He submitted that the reasons recorded by the Appellate Court are perverse.

4. The learned A.G.P appearing for the Respondents

supported the impugned order by pointing out that the Application was belatedly made in the Appeal and therefore, the Appellate Court was justified in declining to grant of amendment.

5. I have considered the submissions made by the Advocates appearing for the parties. As pointed out earlier though the trial Court has held that the Petitioners have established their title, the Petitioners have failed to prove that they were in possession. An Application for amendment of the plaint was made during the pendency of the suit which has been rejected by the trial Court by order dated 06th February, 2003. The amendment has been rejected by placing reliance only on the amendment made to the said Code with effect from 01st July, 2002 by which a proviso was added that no Application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial. The suit was filed in the year 1994 and hence, the said Application could not have been rejected by the trial Court on the ground on which it is rejected. The case of the Petitioners was very specific that they have been dispossessed during the pendency of the suit. The order passed by the trial

Court declining to grant amendment could have been always challenged by the Petitioner in the substantive Appeal preferred by them in view of section 105 of the said Code.

6. It will be necessary to refer to the reasons recorded by the learned Additional District Judge. He has observed that the Application for amendment is filed on 23rd January, 2006 though the suit was filed on 27th January, 1994. The learned Judge has referred to the bar created by clause 3 of sub-rule 2 of Order II said Code by observing that the Petitioners ought to have prayed for relief of possession at the time of filing of the suit. The learned Judge has completely ignored that the case of the Petitioners is that they have been dispossessed during the pendency of the suit. Whether the said case is true or false is to be decided at the stage of leading evidence. This was not a case where the amendment was barred by limitation when the Application was made by the Petitioners both before the trial Court as well as Appellate Court. Infact, with a view to avoid multiplicity of proceedings, the said amendment ought to have been allowed by the trial Court. The learned Additional District Judge has completely ignored that the Application at Exhibit 66 made by the Petitioner during the pendency of the suit was

erroneously rejected.

7. Hence, the Petition must succeed subject to payment of costs. Hence, I pass the following order:

(i) The impugned order dated 17th June, 2006 passed by the learned Additional District Judge is quashed and set aside and the Application made by the Petitioners at Exhibit 14 in Regular Civil Appeal No.117 of 2004 is allowed.

(ii) The Petitioners will pay costs of Rs.2,500/- to the Respondents. The amount will be deposited with the Appellate Court within eight weeks from today.

(iii) It will be open for the Respondents to file additional written statement.

(iv) The learned Additional District Judge will permit the parties to lead additional evidence on the basis of the amendment.

(v) All contentions of the parties in the pending Appeal are expressly kept open.

(vi) Writ Petition is allowed in above terms.

JUDGE